NO. 87-753

In the Supreme Court of the United States

OCTOBER TERM, 1987

JOE ROSETTI,

Petitioner,

versus

AVONDALE SHIPYARDS, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A. Does Admiralty Jurisdiction exist over a claim arising out of the construction of an incomplete vessel, incapable of navigation?

B. Did the 1984 amendments to the Longshore and Harborworker's Compensation Act, 33 USC 901, *et seq.*, abolish the "borrowed employee doctrine" and the immunity to third-party tort liability enjoyed by the borrowing employer?

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ARGUMENT

A. The definition of "vessel" contained in the Longshore and Harborworker's Compensation Act and the General Code are irrelevant to the determination of admiralty jurisdiction where the activity giving rise to the action does not bear any significant relationship to traditional maritime activity.

Writs should be denied in this case because no real conflict exists between the Circuits, as petitioner suggests, on the key legal issue presented in this matter: admiralty jurisdiction. Furthermore, since *Richendollar v. Diamond M Company,* 819 F.2d 124 (5th Cir. 1987) overruled *Hall v. Hvide Hull No. 3,* 746 F.2d 294 (5th Cir. 1984), the "confusion" alleged by petitioner to have existed in the circuits concerning the implication of the decision in *Director, Office of Workers' Compensation Programs v. Perini North River Association,* 459 US 297, 103 S.Ct. 634 (1984) no longer exists.

Petitioners contend that a "split" of authority exists between the First and Fifth Circuits, on the one hand, and the Second Circuit, on the other, regarding the presence/absence of admiralty jurisdiction over third-party tort actions under Section 905(b) of the Longshore and Harborworker's Compensation Act arising out of vessel construction. See *Richendollar v. Diamond M Company, supra; Drake v. Raymark Industries, Inc.,* 772 F.2d 1007 (1st Cir. 1985) and *McCarthy v. THE BARK PEKING,* 716 F.2d 130 (2nd Cir. 1983). In fact, these decisions can be reconciled rather easily.

Richendollar and *Drake* both involve the question of whether admiralty jurisdiction exists over shipyard workers exerting a Section 905(b) tort claim against a defendant vessel owner injured in the course of the

construction of a vessel. These cases both concluded that admiralty jurisdiction did not exist under the the *Executive Jet/Foremost Insurance* analysis.

McCarthy, supra, cited by Petitioner as the rogue case which justifies the granting of a writ in this case, initially concluded that the plaintiff, McCarthy, could not pursue a Section 905(b) action against his employer, a museum, because he was not engaged in "maritime employment" at the time of his accident, as required by the Act. The Supreme Court remanded the *McCarthy* case to the Second Circuit Court of Appeals for reconsideration, based upon the decision in *Director, Office Of Workers' Compensation Programs, etc., v. Perini North River Associates, supra.* The issues presented and considered in McCarthy, on remand, were whether the plaintiff was a covered employee (pursuant to *Perini)* and whether THE BARK PEKING was a "vessel" against which an action could lie. The question of adequate "nexus" of the wrong to traditional maritime activity was neither discussed nor decided in *McCarthy,* as it was in *Richendollar* and *Drake.*

The instant case is clearly the progeny of *Richendollar,* as is plainly evident from the first sentence of the *per curiam* opinion below. *Richendollar,* was a monumental decision in the realm of admiralty jurisdiction, decided only after a rare rehearing *en banc,* explicitly reversing or overruling earlier holdings in several cases, including *Hall v. Hvide Hull No. 3, supra,* with which the instant case was consolidated on appeal. Writs were denied by this Court in the *Richendollar* case, which would obviously control the outcome of the case at bar. If writs were denied in *Richendollar,* it makes no sense to grant them in this case.

The only distinction offered by petitioners in this case to escape the *Richendollar* precedent is that in *Richendollar,* the injury occurred on *land* while in this case, the

vessel had already been launched. Petitioner offers a 1902 decision of this Court to support the distinction. *Tucker v. Alexandroff,* 183 U.S. 424, 22 S.Ct. 195 (1902). This distinction is without significance, since it is conceded that the vessel in this case, the OGDEN I, was afloat on navigable waters at the time of the accident, and therefore met the "situs" requirement of admiralty jurisdiction. What is at issue here, as in *Richendollar,* is whether the "nexus" requirement has been met. Thus, the fact that the accident here occurred on navigable waters is completely irrelevant, and the case at bar is indistinguishable in any significant sense from the holding of the Fifth Circuit Court of Appeals in *Richendollar.*

The fundamental point made in *Richendollar,* of course, is that for the nexus requirement to be met:

> "such a vessel must be capable of navigation or its special purpose use on water." *Richendollar, supra,* at page 125."

In *Richendollar,* the DON E. McMAHON was 80% complete, had holes in its hull, and was not capable of navigation. In *Rosetti,* the OGDEN I was not navigable: the majority of the navigation equipment was not installed, dock and sea trials had not taken place, and no vessel crew had been assigned to the vessel. The ODGEN I was between 80 and 85% complete at the time of the accident. See *Per Curium* opinion below, reproduced in petitioner's appendix at A-27; *Hall v. Hvide Hull No. 3,* 746 F.2d 294 (5th Cir. 1984). The OGDEN I was no more navigable at the time of the accident in this case than was the DON E. McMAHON when Richendollar was injured. In light of the Admiralty Extension Act, 46 USC 740, the fact that the DON E. McMAHON was located on land would not have defeated admiralty jurisdiction if it had been capable of navigation. Thus, the situs issue is a completely bogus distinction.

Petitioners repeatedly cite this Court's decision in *Perini* as if that case mandated a contrary result here, and that the opinions in *Richendollar* and *Drake* somehow run contrary to *Perini's* holding. This argument merits little consideration.

Perini rejected the argument, advanced by the defendant in that case, that the LHWCA coverage for *compensation* benefits under Section 905(a) is premised upon admiralty jurisdiction, requiring a connection between an employee and traditional maritime activity. The Court was cognizant of the fact that Congress did not intend to withdraw *compensation* benefits to those workers who had already been covered by the Act prior to the 1972 amendments. However, while Congress *expanded* coverage for *compensation* benefits under the Act, the congressional intent with respect to Section 905(b) actions was to *restrict* benefits previously reserved to maritime workers under the Act by, for example, abrogating the right of such workers to a warranty of seaworthiness. The *Richendollar* decision expressly noted this restriction of *tort* benefits provided by Section 905(b) by reference to the decision in *Parker v. South Louisiana Contractors,* 537 Fd.2d 113 (5th Cir. 1976) which held, *inter alia:*

> "Taken as a whole, the mainifest purpose of Section 905(b) is to curtail rather than expand the availability of third-party actions in admiralty." *Richendollar,* supra, at page 126.

Furthermore, if any doubt remained about Congressional intent, it should be noted that the 1984 amendments to Section 905(b) further curtailed third-party actions by abrogating all such actions against employers which had theretofore been judicially recognized since the hallmark decision in *Smith v. M/V CAPTAIN FRED,* 546 Fd.2d 119 (5th Cir.1977). The 1984 amendments, applicable here,

would undoubtedly bar the instant action altogether had it occurred after September 28, 1984. LHWCA Amendments of 1984, Pub.L. No. 98-426, Section 5(b), 98 Stat. 1639, 1641.

Accordingly, while the Second Circuit in *McCarthy* was corrected by the Supreme Court insofar as its initial decision regarding the scope of "maritime employment" was concerned, the panel of the Fifth Circuit which utilized *Perini* to extend admiralty jurisdiction in *Hall v. Hvide Hull No. 3, supra,* was clearly wrong to do so. *Perini* said nothing regarding tort actions which could be construed as expanding admiralty jurisdiction. Petitioner relies also on *Eagle-Picher Industries, Inc. v. United States of America,* 657 F.Supp. 803 (E.D.Pa. 1987) which followed *Hall v. Hvide Hull No. 3, supra,* and *Perini* (as interpreted by *Hall*). However, since *Richendollar,* it is doubtful whether the District Court in that case would have decided the case before it in the same way. Furthermore, relying as it did on *Hall v. Hvide Hull No. 3, supra,* which has now been overruled *en banc,* the *Eagle-Picher* case is now simply an aberration.

Finally, it makes no difference as petitioner suggests that the OGDEN I would come within the definition of "vessel" in the Act itself or, for that matter, the general code definition contained in 1 USC Section 3. If it did not, of course, the Act itself would bar this action. But the fact that the OGDEN I does concededly fall within the definition of "vessel", does not, *ipso facto,* confer admiralty jurisdiction as petitioners would suggest. Without such jurisdiction, a Section 905(b) tort action will not lie notwithstanding the fact, as in this case, that diversity jurisdiction also exists. *Drake v. Raymark Industries, Inc., supra.*

While the OGDEN I may be a "vessel", according to

the Act or the General Code, the undisputed fact that it was incapable of navigation or its special purpose use on or in water deprives petitioner of any right of action in admiralty because the hull under construction at the time of the accident lacks a sufficient nexus to traditional maritime activity. Longstanding precedent has confirmed time and again that Section 905(b) of the LHWCA did not *create* a new cause of action, but merely *preserved* one. *Russell v. Atlantic and Gulf Stevedores,* 625 F.2d 71 (5th Cir. 1980); *William P. Brooks Construction Company, Inc. v. Guthrie,* 614 F.2d 509 (5th Cir. 1980); *Gay v. Ocean Transport and Trade Ltd.,* 546 F.2d 1233 (5th Cir. 1977); *Parker v. Southern Louisiana Contractors, supra.* Furthermore, vessel construction has repeatedly been held not to have sufficient connection to traditional maritime activity to support admiralty jurisdiction. *Frankel v. Bethlahem Fairfield Shipyard, Inc.* 132 F.2d 634 (4th Cir. 1942) cert. den. 319 U.S. 746, 63 S.Ct. 1030 (1943); *Hollister v. Luke Construction Company,* 517 F.2d 920 (5th cir.1975); *Alfred v. M/V MARGARET LYKES,* 398 F.2d 684 (5th Cir. 1968); *Garcia v. American Marine Corp.,* 432 F.2d 6 (5th Cir. 1970); and a host of other decisions.

Thus, there exists no conflict in the circuits, as petitioner suggests, nor any further confusion about the application of *Perini* since the *Richendollar* decision expressly overuled the earlier *Hall v. Hvide Hull No. 3* case, *supra,* upon which relied the District Court in *Eagle-Picher Industries Inc. v. United States of America, supra.* Accordingly, this Court should deny petitioner's writ application.

B. The 1984 amendments to the LHWCA which would otherwise bar petitioner's action did not abolish the borrowed employee doctrine nor abrogate the tort immunity enjoyed by a borrowing employer under the Act.

Apparently, as an afterthought, petitioner attempts to wriggle out from under the exclusive immunity portion of the LHWCA, which renders Avondale otherwise immune from this tort action, by claiming that since Avondale did not secure the payment of compensation benefits to Rosetti, it should not be deemed immune from his tort action. See 33 USC 905(a) (1984). Assuming this amendment is applicable to this action, for the moment, as petitioner suggests, and the same 1984 amendments which would clearly bar this action are not, petitioner's argument is fallacious. Petitioner confuses the implications of a "statutory" employer, as was the case in *Washington Metropolitan Transit Authority v. Johnson*, ____ U.S. ____, 104 S.Ct. 2827 (1984), for which the 1984 amendments were enacted, with that of a "borrowing employer". See *Gaudet v. Exxon Corp.*, 562 F.2d 351 (5th Cir. 1977); *Hebron v. Union Oil Company*, 634 F.2d 245 (5th Cir. 1981). In any case, it has already been decided that the 1984 Amendments did not abolish the borrowed employee doctrine in such cases as these. *West v. Kerr McGee Corp.*, 765 F.2d 526 (5th Cir. 1985).

Ironically, petitioner cites only the concurring opinion in the *West v. Kerr McGee Corp* decision, at page 20 of his Brief. It is interesting to note that this isolated statement in the *West* case was authored by Judge Albert Tate in the concurring opinion, rather than the majority which, in their decision, expressly rejected the same argument being made here by petitioner. It should also be pointed out that the same author also wrote the misbegotten decisions in *Lundy v. Litton Systems, Inc., supra* and *Hall v. Hvide Hull No. 3, supra.*, which initially created the confusion which the *en banc* decision in *Richendollar* has since resolved.

CONCLUSION

Since no *bona fide* "split" of authority exists regarding the existence of admiralty jurisdiction over an accident arising out of construction of an incomplete vessel, incapable of navigation, and since the *Perini* decision is inapplicable to third-party tort actions, there is no basis for the granting of a Writ of Certiorari in this case. Likewise, since the borrowed employee doctrine has been held to have existed since the 1984 Amendments to the LHWCA, petitioner's attempt to avoid the immunity provisions of Section 905(b) of the Act is meritless.

Respectfully submitted,

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CERTIFICATE

I hereby certify that a copy of the above and foregoing Brief In Opposition To Petition For Writ Of Certiorari has been mailed to Judy M. Guice, 310 Main Street, Post Office Box 1388, Biloxi, Mississippi, 39533 by depositing it in the United States mail postage prepaid and properly addressed.

Metairie, Louisiana, this 7th day of December, 1987.

NELSON W. WAGAR, III